IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 5171 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYESH G RAMANI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 5171 of 2004

MR YN OZA with MR. HRIDAY BUCH for Petitioner No. 1

MR AD OZA, PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 20/07/2004

ORAL JUDGEMENT

1. Rule. Mr. A.D. Oza, learned Public Prosecutor,

waives service of rule.

2. The present anticipatory bail application has been preferred by the petitioner in connection with C.R. No. I-196 of 2003 of Vadodara City Police Station.

3. I have heard Mr. Y.N. Oza, learned senior counsel for the petitioner and Mr. A.D. Oza, learned Public Prosecutor for the State.

4. It may be recorded that the very petitioner had earlier preferred anticipatory bail application before this Court, being Criminal Misc. Application No. 9352 of 2003 and the same came to be rejected by this Court as per decision dated 19.11.2003. This Court, in the said decision, at paragraphs 6 and 7, observed as under:-

".6 Having considered the above, I am of the view that so far as the considerations for anticipatory bail are concerned, it would be profitable to refer to the recent decision of the Apex Court in the case of "Bharat Chaudhary and Another v. State of Bihar and Anr." reported in 2003 (8) SCC.77. The Apex has observed at para 7 as under:

"7. The object of section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the courts concerned from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail.:.

7. If the matter is examined accordingly, at this stage, it does transpire that Kanaiyalal, as

per the complaint, is abducted by the petitioner No.1 and till today Kanaiyalal is not traced by the police. It may be that the Police, during the course of investigation, may require custodial interrogation, considering the seriousness of the offence of abduction of the brother of the complainant; I am of the view that if the anticipatory bail is granted, more particularly qua petitioner No.1 at this stage, it may hamper the investigation and the investigating machinery will not be in a position to proceed further with the investigation in a convenient manner, more particularly for the purpose of tracing the person who is abducted."

4. Ultimately, so far as the other accused are concerned, anticipatory bail was granted. However, as concluded in paragraph 8 in the said decision, the application of the present petitioner herein was rejected.

5. Mr. Y.N. Oza, learned counsel appearing for the petitioner submitted that as such the petitioner had preferred a Special Leave Petition before the Apex Court against the decision dated 19.11.2003 whereby the anticipatory bail application was rejected. However, he submitted that the said petition remained pending before the Apex Court for some time in "office objections" and ultimately, as there was change in the circumstances, the petitioner did not press the SLP by accepting the decision of the the Registry of the Apex Court of not registering the SLP. When Mr. Y.N. Oza was called upon to produce a copy of the order passed by the Apex Court before this Court, he has shown his inability to produce the same by saying that when the registration is refused, it may not be possible for the petitioner to produce copy of the order, and the matter, therefore, may be considered accordingly. As such it is the duty of the petitioner to produce the authenticated record of the outcome of the proceedings of the SLP, if filed. However, the petitioner has not produced, and, therefore, this Court is not in a position to verify the outcome of the SLP and the matter is considered on the basis that the SLP was not pressed by accepting the decision of the Apex Court of not registering the SLP or cancelling the registration, as the case may be.

6. Mr. Y.N. Oza, learned counsel appearing for the petitioner submitted that even otherwise also, there are change in the circumstances which would enable the petitioner to once again invoke the discretionary

jurisdiction of this Court for anticipatory bail. For substantiating his contention, he submitted that a habeas corpus petition was filed by the brother of the so called abducted person, viz. Vedprakash Melumal Arya, being Special Criminal Application No. 994 of 2003, and in the said petition, the Division Bench of this Court directed for trasnferring the investigation with a view to find out the person of Kanaiyalal. He submitted that during the course of investigation, when the matter was pending before the Division Bench in the aforesaid petition, statements of three witnesses were recorded, which goes to show that Kanaiyalal was in Ahmedabad and he talked to those persons on mobile. Mr. Y.N. Oza submitted that due to the aforesaid change in the circumstances, even the father of the petitioner, who is a co-accused, moved an application for modification of the conditions before the Court by filing Criminal Misc. Application No. 10370 of 2003 and this Court [Coram: D.P. Buch, J.], while deciding the said application for modification of the condition, in its order dated 19.1.2004 has recorded the said aspect, more particularly of statement of those three witnesses showing the availability of Kanaiyalal at Ahmedabad, and therefore, Mr. Y.N. Oza submitted that when a co-ordinate bench has accepted the change in the circumstances, this Court also may consider the matter accordingly, and may release the petitioner on anticipatory bail. Mr. Y.N. Oza also submitted that as such even after the order dated 19.11.2003 passed by this Court rejecting the anticipatory bail application, the petitioner was available. However, no attempts are made by the police to arrest, and, therefore, if the police has not arrested the petitioner though available, it would not be a ground which would go against the petitioner for seeking anticipatory bail from this Court. Mr. Y.N. Oza, learned counsel for the petitioner has also relied upon the decision of this Court in the case of SUKAR NARAYAN BAKHIA vs. R.P. SHAH & ANR reported in 1984 GLH 1162 for contending that each application is to be heard on merits irrespective of the result of the previous application. Mr. Oza for the petitioner also relied on the judgment in the case of SOLANKI RAVIBHAI vs SATE reported in 1992 (]) GLR 631 for contending that considerations for regular bail and anticipatory bail would be the same.

7. On behalf of the State, it has been submitted by the learned Public Prosecutor Mr. A.D. Oza that as per the report of the investigating officer, the petitioner is absconding, and he is required for custodial investigation. He also submitted that pending the petition, since the petitioner was not traced and found,

an application was moved to the learned Magistrate for issuing warrant, and on 8.7.2003 a warrant has also been issued. He submitted that the present application is an application for anticipatory bail, and the application made by the petitioner earlier for anticipatory bail has been rejected by this Court, and, therefore, successive or second application is not maintainable. He relied upon the decision of the Apex Court in the case of JAGTAR SINGH vs. SATENDRA KAUR @ BHAVANA GROVER & ORS. reported in 2002 CR.L.R. [SC] 807 for contending that when the accused are absconding, there is no question of granting anticipatory bail or regular bail. For change in the circumstances, Mr. A.D. Oza, learned PP relied upon the decision of this Court in the case of STATE OF GUJARAT vs. ALPESHBHAI NAVINBHAI PATEL reported in 2004 (1) GLH 754 and contended that change in the statement of the witnesses would not give a fresh cause for exercise of the power by the Court for bail.

8. The first aspect which this Court may be required to consider is the maintainability of the successive or second application for anticipatory bail, after rejection of the earlier anticipatory bail on merits. In the case of STATE OF GUJARAT vs. ALPESHBHAI NAVINBHAI PATEL [supra], this Court had an occasion to consider more or less a similar situation for regular bail application. The learned Sessions Judge, in the said case, had earlier rejected the regular bail application of the accused on merits, who were allegedly involved in the offence under sec. 302 of the IPC. Thereafter, certain witnesses made statements disowning their earlier statements in the proceedings before the Executive Magistrate. The same was taken as the basis by the learned Sessions Judge again for entertaining the bail application, and bail was granted. The matter was carried before this Court, and this Court, at paragraph 9, observed as under:-

> "9. The only change thereafter as per the accused is the filing of complaint for receiving/giving threats before the Ld. Magistrate [JMFC] by the aforesaid persons, namely, Jigar, Anant and others and the verification of statements made under Section 202 of Cr. P.C. disclosing that they have not made any such statement. The thrust of the argument on behalf of the accused is that it is on account of such a change in circumstances, the learned Sessions Judge considered the fresh bail application. I am afraid such contention can be accepted, when a prima facie case is made out as per prosecution and the learned Sessions Judge

having found that there is a prima facie involvement of the accused in the alleged offence. As such, the statements made before another authority for disowning the earlier statement or stating that no such statements were made, may result into tampering with the evidence or the statements already made before the police. Whether such disowning or denial of any statement made before during the investigation would invite further consequences or not would be a different aspect and I do not want to express any final view on the same at this stage since the same is not the issue in the present case, and the said question is kept open. However, if such statements made before another authority in the other proceedings is to be made as basis for invoking of powers of the court for considering the fresh bail application then in that case it would leave room to any witness to frustrate the case of the prosecution and would result into upsetting the sanctity of the order passed by the judicial authority and consequently would create absurd situation. It is true that at the time when the court has to consider the matter for granting and/or rejecting the application for bail prima facie the matter is to be examined and the observations are also to be made prima facie with a view to see that the defence of the accused is not prejudiced at the trial, but thereby it cannot be said that if before a different authority in the different proceedings subsequently some statement is made by the witnesses, the same would result into substantial change and would form a valid basis for invoking power of the very court once again for bail. Normally, the substantial change in the circumstances are being considered stagewise, i.e. (i). at the stage of considering the matter for granting anticipatory bail; (ii). at the stage of considering the matter for regular bail before the charge sheet when the investigation is in progress and, (iii). after filing of charge sheet and after completion of investigation. If retraction or denial of statement made by the witnesses before any authority is to be considered as a substantial change in the circumstances at the stage of bail, then the consequences would be that there will not be any end to proceedings of bail application and also more serious consequences would arise which will leave room to accused who are involved

in a serious offence either directly or indirectly to take a chance of invoking the power of the court for bail, time and again, on such grounds. It may also result into tampering the witnesses and thereby damaging the investigation and case of prosecution before commencement of trial. Therefore, I find that merely because the statements which are made in different proceedings by witnesses cannot be said to be a substantial change attracting the powers of the Ld. Sessions Judge for considering the fresh application for bail."

9. Ultimately, it was found by the Court that the learned Sessions Judge could not have exercised the jurisdiction once having rejected the bail application on merits, and as a consequences thereof, the order of the learned Sessions Judge of granting bail was set aside. In my view, on the basis of the same reasonings, and in view of facts and circumstances as stated hereinafter, it can also be said in the present case that the second anticipatory bail should not be entertained by this Court on the alleged ground of statements of certain witnesses during the course of investigation.

10. A peculiar circumstance in the present case is that as per the prosecution case, the petitioner is not traceable and is absconding. Mr. V.M. Rajput, Assistant Commissioner of Police, Vadodara City has filed an affidavit-in-reply and at paragraphs 8, 9 and 10, it has been stated as under:-

"8. I say that the petitioner is not available to investigation that, several attempts have been made to apprehend the petitioner, as he is required for custodial interrogation, in connection with this offence. I say that, Shri Gohil - Police Inspector, who was earlier investigating the offence had visited the residence, as well as, the office of the petitioner on 5/11/2003, 11/11/2003, 22/11/2003, 27/11/2003 and 29/11/2003.

9. It is submitted that during the period also, watch was kept on at his office, as well as, the Baroda District Court where the petitioner is known to practice. The subsequent Investigating Office Shri K.A. Desai, A.C.P. Division also made similar attempts by visiting the house as well as, the office of the petitioner and also kept watch at both the

places, as well as, Court premises. After, I took over the investigation, the deponent also visited the house of the petitioner on 20/6/2004 and inquired from the wife of the petitioner also, said that, she was completely ignorant of his whereabouts.

10. It is submitted that, during the entire period the subordinate had made frequent visits at the office and residence and have also kept this places and the Courts in Court Rooms under watch. In addition to this, the petitioner being of well known figure in the Baroda. All the Police Inspectors of Baroda Police Stations have been informed and instructed to apprehend the petitioner, the moment he seen. It is further submitted that, as the petitioner is not available to the investigation, application for issuance of arrest warrant under Section 70 of the Criminal Procedure Code was made and the Hon'ble Magistrate was pleased to issue the warrant of arrest against the petitioner."

11. Mr. Y.N. Oza, learned counsel for the petitioner made an attempt to submit that as such, the warrant has been issued by the learned Magistrate pending the petition before this Court. He further submitted that the said attempt on the part of the prosecution is to support their case and to make a show that the petitioner is absconding, and, therefore, he submitted that the circumstance of issuance of warrant by the learned Magistrate against the petitioner may not be considered against the petitioner. I am afraid such a contention can be accepted. If, as per the prosecution case, the petitioner is not traceable and is absconding, the petitioner would not be entitled to invoke the discretionary jurisdiction of this Court for anticipatory bail. Reference may be made to the decision of the Apex Court in the case of JAGTAR SINGH [supra] where the Apex Court has observed at paragraph 2 as under:

"2. The order passed by the High Court appears to be usual one. Learned counsel for the State submits that at present the respondents-applicants are absconding. Normally, when the accused are absconding there is no question of granting anticipatory or regular bail. Admittedly, neither the High Court nor the Sessions Court has granted anticipatory bail in this matter. Hence, it would be open to the

investigating officer to arrest the respondents."

12. The Apex Court has thus held that normally when the accused are absconding, there is no question of granting anticipatory or regular bail.

13. One more circumstance is that when the petitioner is fully aware that this Court has rejected the anticipatory bail as back as on 19.11.2003 and thereafter the petitioner has not presented himself even for investigation. Merely because the petitioner was present on some dates before the Division Bench of this Court in the Habeas Corpus petition cannot be a ground to conclude that the petitioner is not absconding. As such, even during the course of the hearing, it was put by this Court to Mr. Y.N. Oza, learned counsel for the petitioner as to what will be the approach of the petitioner after decision of the present petition. In response thereto, it has been stated by Mr. Oza on behalf of the petitioner that in case this Court rejects the bail application, the petitioner would like to approach the higher forum. Be that as it may, the fact remains that even during the course of hearing, the petitioner has not presented himself for interrogation by the police.

14. As regards the merits of the anticipatory bail application is concerned, when this Court considered the matter on 19.11.2003, it was observed at paragraph 7 hereinabove quoted that the police, during the course of investigation may require custodial interrogation considering the seriousness of the offence of abduction of the brother of the complainant. The offence alleged is abduction of one Kaniyalal, who is not traced for a period of about more than one year. Therefore, in a serious matter where the person is abducted and is not traced for a period of one year, it cannot be said that custodial interrogation may not be required at all by the Investigating agency. Mr. Y.N. Oza for the petitioner submitted that the charge sheet has been filed, and, therefore, further investigation may not be required. In my view, even in the charge sheet, the petitioner is shown as absconding. If out of the custodial interrogation some additional material is found, it can always be placed on record by supplementary charge sheet or additional material in support of the same, and, therefore, merely because charge sheet is filed would not be a ground for accepting the contention of the petitioner that he should be released on anticipatory bail. Moreover, as referred to hereinabove at paragraph 8 of the affidavit-in-reply of the Investigating Officer

Mr. Rajput has stated as under:

> "I say that the petitioner is not available to investigation that, several attempts have been made to apprehend the petitioner, as he is required for custodial interrogation in connection with this offence."

Therefore, if the petitioner is ordered to be enlarged on anticipatory bail, the investigation officer may not be able to gather sufficient and proper material in connection with the alleged offence. Under the circumstances also, it would be a ground for not exercising the discretion in favour of the petitioner to release him on anticipatory bail.

15. Mr. Y.N. Oza, learned advocate appearing for the petitioner also made an attempt to submit that the co-ordinate bench of this Court [Coram: D.P. Buch, J.] in his order dated 19.01.2004 in Criminal Misc. Application No. 10370 of 2003 has made an observation while modifying the conditions in the case of the co-accused, Mr.. Gopal Ramani, who is the father of the petitioner, and therefore, he submitted that the observations made in the said decision are binding to the co-ordinate bench of this Court, and therefore, this Court also may, on the basis of the same reasoning, release the petitioner on anticipatory bail. There cannot be any dispute on the principle of following the decision taken by a co-ordinate bench of this Court. However, what was considered by the co-ordinate bench [Coram: D.P. Buch, J.] in Criminal Misc. Application No. 10370 of 2003 is modification of conditions of the regular bail which was already granted, whereas in the present case, the stage is of considering anticipatory bail. The consideration for exercise of discretion at the stage of anticipatory bail and regular bail would be different to the extent that to the extent that at the time of granting anticipatory bail, the Court may consider the aspects as to whether the investigation machinery may require custodial interrogation or not whereas at the time of granting regular bail, the Court may consider the aspect as to whether the custody of the accused in connection with the offence is required or not. Further, in the present case, as observed earlier, there are two additional circumstances, one is, that a successive bail application should not be entertained, and the second is that as per the prosecution case, the petitioner is not traceable and is absconding. In view of the aforesaid peculiar and additional circumstances, I cannot accept the contention of Mr. Y.N. Oza for the

petitioner that the petitioner should also be released on anticipatory bail in view of observations made by a co-ordinate bench of this Court in its order dated 19.01.2004 in Criminal Misc. Application No. 10370 of 2003. In view of the aforesaid reasons, the decision of this Court in the case of Solanki Ravibhai [supra] upon which reliance is placed by Mr. Y.N. Oza would not apply to the facts of the present case. In the same way, the decision of this Court in the case of Sukhar Narayan Bakhia [supra] would be of no help to the petitioner.

16. In light of the aforesaid, the application deserves to be rejected, and is hereby rejected. Rule is discharged.

[JAYANT PATEL, J.]
mathew